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CASE NO. 88-7835

COURT OF THE UNITED STATES

MICHAEL

FRANK L. MORRIS, WARDEN

Respondent.

On Petition For Writ Of Certiorari To The  
United States Court Of Appeals  
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENT

CASE NO. 88-7535

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1989

MICHAEL TERRELL,

Petitioner,

v.

TERRY L. MORRIS, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The  
United States Court Of Appeals  
For The Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Has a federal court correctly concluded that a state prisoner waived federal habeas corpus review when that prisoner did not show either cause or prejudice for his failure to raise his claims on direct appeal as required by state procedure?

**PARTIES**

The respondent in this action is Terry L. Morris<sup>1</sup> in his capacity as Warden of the Southern Ohio Correctional Facility at Lucasville, Ohio. The petitioner is Michael Terrell, an inmate currently incarcerated in the Southern Ohio Correctional Facility.

<sup>1</sup>Ronald Marshall who was named as the original Respondent in this case is deceased. The proper Respondent is Terry L. Morris, the current superintendent of the Southern Ohio Correctional Facility.

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For The Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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DECISIONS BELOW

The unreported order dated May 19, 1989 of the United States Court of Appeals for the Sixth Circuit, denying Petitioner's motion for rehearing en banc in Terrell v. Morris, Case No. 88-3543, is set forth in the Appendix at A.-1<sup>2</sup>; the unreported opinion dated April 3, 1989 of the United States Court of Appeals for the Sixth Circuit in Terrell v. Morris, Case No. 88-3543, (A.-2); the unreported opinion of the United States District Court for the Southern District of Ohio, Eastern Division dated June 3, 1988, (A.-5); and the unreported Magistrate's Report denying habeas corpus relief dated December 29, 1986, (A.-9).

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<sup>2</sup>References to the Appendix attached to Respondent's brief will hereinafter be referred to as "(A.-)".

JURISDICTION

The judgment of the Court of Appeals, Sixth Circuit, was entered on April 3, 1989, affirming the denial of petition for writ of habeas corpus under the jurisdiction of Title 28 U.S.C. §2254. The Court of Appeals denied a timely petition for rehearing en banc on May 19, 1989. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF THE CASE

A. Procedural History

Petitioner Michael Terrell, #161-642, (hereinafter Terrell) was indicted by the Hamilton County Grand Jury on two (2) counts for the crime of aggravated robbery in violation of Ohio Revised Code Section 2911.01. Upon arraignment, Terrell entered a plea of not guilty and the cause came on for jury trial. The jury returned a verdict of guilty as charged. On February 11, 1981, Terrell was sentenced to consecutive terms of from seven (7) to twenty-five (25) years imprisonment. Case No. B804083.

Terrell thereafter perfected an appeal of the Common Pleas Court judgment to the Court of Appeals for the First Judicial District alleging the following assignments of error:

1. The trial court rendered a harsher sentence when Terrell elected to plead not guilty and stand trial.
2. The trial court erroneously permitted a state witness to identify Terrell as wearing a jail uniform.
3. Miranda violation.
4. Unlawful search and seizure.

On December 30, 1981, the appellate court issued an opinion overruling Terrell's assignments of error. The Court of Appeals also affirmed the Common Pleas Court judgment. Case Nos. C-810148, C-810164.

Terrell next filed a notice of appeal in the Ohio Supreme Court. However, Terrell failed to file a memorandum in support of jurisdiction in the Ohio Supreme Court. Therefore, on June 7, 1984 his appeal was dismissed for want of prosecution. Case No. 84-297.

Terrell also filed a post-conviction petition pursuant to Ohio Revised Code Section 2953.21(A) in the Hamilton County Common Pleas Court. On July 7, 1982, Terrell's petition was

dismissed because all of the claims listed in the post-conviction petition were or could have been raised on direct appeal.

Terrell appealed the dismissal of his post-conviction petition to the Court of Appeals for the First Judicial District. Terrell only asserted one error on appeal. Specifically, Petitioner contended that the Common Pleas Court erred in failing to conduct an evidentiary hearing on the ineffective assistance of counsel claim raised in Terrell's post-conviction petition. On June 1, 1983, the Court of Appeals issued an opinion affirming the lower court's decision because the allegations listed in Terrell's post-conviction petition should have been raised on direct appeal. Case No. C820629.

Terrell subsequently filed a memorandum in support of jurisdiction in the Supreme Court of Ohio. Terrell alleged that he was entitled to an evidentiary hearing on the ineffective assistance of counsel claim contained in his post-conviction petition. The prosecution filed a memorandum opposing jurisdiction. On January 25, 1984, the court overruled Terrell's motion for leave to appeal. Case No. 83-1110.

On October 15, 1984, Terrell filed a petition for writ of habeas corpus in the United States District Court, Southern District of Ohio, Western Division in which he alleged the following grounds for relief:

1. The trial court misled Terrell and rendered a harsher sentence when Terrell elected to stand trial.
2. The trial court erred in denying Terrell's motion for a mistrial when a state witness identified Terrell as wearing a jail uniform.
3. Denial of effective assistance of counsel.

4. The trial court forced Terrell to be represented by ineffective counsel.
5. Conviction obtained through admission of coerced statement.
7. Attorney denial at pretrial lineup.
8. Unduly suggestive pretrial lineup.
9. Prosecutorial use of perjured testimony.
10. Terrell's indictment was neither signed by the foreman nor deputy foreman of the grand jury.
11. Unlawful search and seizure.

On November 26, 1984, Respondent, Terry L. Morris, Warden of Southern Ohio Correctional Facility, (hereinafter Respondent) filed a return of writ. Respondent contended that under the principles enunciated in Rose v. Lundy, 455 U.S. 509 (1982), Terrell's petition for habeas corpus should be dismissed. This contention was premised on the fact that Terrell's petition for habeas corpus contained a mixture of exhausted and unexhausted claims.

In response to Respondent's return of writ Terrell filed a Motion to Amend Petition in the district court. In this motion Terrell contended that his right to due process was violated because the trial court judge failed to sign the journal entry which authorized his incarceration. Also, Terrell filed a memorandum in support of jurisdiction for direct appeal in the Supreme Court of Ohio.

In his memorandum in support of jurisdiction Terrell asserted thirteen propositions of law. Included in the thirteen propositions of law were all of the grounds which Terrell asserted on appeal to the Ohio Court of Appeals for the First Judicial District. The prosecution filed a memorandum in opposition to jurisdiction. On October 2, 1985, the Ohio Supreme Court sua sponte overruled Terrell's motion for leave to appeal because no constitutional question existed. Case No. 85-665.

On November 4, 1985 Respondent filed a supplemental return of writ. On December 29, 1986, Magistrate J. Vincent Aug Jr. filed a report in which he recommended that Terrell's entire petition be dismissed. The magistrate held that Terrell's third through fifth, seventh through tenth and supplemental grounds for relief were waived. Magistrate Aug also determined that the remainder of Terrell's claims were without merit. Terrell then filed objections and untimely supplemental objections which challenged all but the rejection of Terrell's first habeas corpus ground for relief. On June 3, 1988, the United States District Court, the Honorable Herman J. Weber presiding, issued a memorandum and order adopting the magistrate's findings. Judge Weber also dismissed Terrell's habeas corpus petition. Case No. C1-84-1511. (A.-5).

Terrell appealed the dismissal of his habeas corpus petition to the United States Court of Appeals for the Sixth Circuit. The judgment of the district court was subsequently affirmed by the United States Court of Appeals for the Sixth Circuit on April 3, 1989. (A.-2). The Sixth Circuit premised its decision on its finding that the district court's ruling represented a sound application of the waiver doctrine. On May 19, 1989, Terrell's petition for rehearing en banc was denied. (A.-1).

Terrell is presently before this Court pursuant to the filing of a petition for writ of certiorari.

#### B. MATERIAL FACTS

On September 15, 1980, at 4:20 p.m. Terrell entered the Fidelity Federal Savings and Loan office in downtown Cincinnati wearing a jogging suit and yellow sun visor. (Tr. 54, 55, 57, 82, 83). After initially claiming that he wanted to make a deposit, Terrell pulled a gun and the teller gave him the money in her cash drawer. (Tr. 54, 55, 56, 82, 83, 84). The lighting conditions were good and State's Exhibit #1, a video



tape, recorded the incident. (Tr. 82, 86-89). Later, both the teller and another employee positively identified Terrell as the man who committed the aggravated burglary. (Tr. 54, 57, 82, 85).

Terrell repeated his felonious activities on October 7, 1980. At 2:00 p.m., on this date, Terrell entered the Franklin Savings Office on Reading Road in Sharonville, Ohio, pointed a gun at the petrified teller, and told her that he needed money. (Tr. 96, 98, 99, 137, 138, 140). Two employees positively identified Terrell as the perpetrator of this aggravated robbery. (Tr. 96, 109, 137, 139). The teller gave Terrell some "bait money" thereby triggering a silent alarm. (Tr. 96, 100).

Terrell fled, but shortly thereafter Reading Police Officer Jerry Badgett received a radio call describing Terrell's car. (Tr. 115, 116, 119). After several moving traffic violations occurred, Officer Badgett stopped Terrell. (Tr. 115, 119, 120, 121). Without any prior questioning by the officer, Terrell immediately tried to bribe his way to freedom:

Look, man, the money is in the jacket pocket in the car . . . . It's yours, just leave me go.

(Tr. 115, 122). Terrell was arrested and the Miranda warnings given. A search of the jacket pocket in the car revealed \$1,426.00 and an automatic pistol. (Tr. 115, 123).

The following day, Terrell gave statements to the F.B.I. and Cincinnati police confessing to both aggravated robberies. (Tr. 243, 260). Both were reduced to writing and signed by Terrell.

#### ARGUMENT

- I. THE FEDERAL COURT CORRECTLY CONCLUDED THAT PETITIONER WAIVED FEDERAL HABEAS CORPUS REVIEW WHEN HE DID NOT SHOW EITHER CAUSE OR PREJUDICE FOR HIS FAILURE TO RAISE HIS CLAIMS ON DIRECT APPEAL.

Petitioner Terrell is before this Court challenging the propriety of the federal courts' application of the waiver doctrine. Respondent contends that the Sixth Circuit Court of Appeals' decision should not be reviewed because its determination merely represents the application of the waiver doctrine as enunciated by this Court.

In its dismissal of Terrell's post-conviction petition, the Court of Common Pleas stated that all of Terrell's claims "including the question of effective assistance of counsel were or could have been raised at which time [Terrell] was represented by new counsel." District Court Record Entry No. 6, Return of Writ, Exhibit F, p. 4. Thereafter, the only claim which Terrell asserted in the Court of Appeals for the First Judicial District concerned his failure to receive an evidentiary hearing on his ineffective assistance of counsel claim. In rejecting Terrell's sole assignment of error the appellate court held:

Because we are convinced that the various matters asserted in the petition either should have been raised by new counsel on direct appeal from the judgment of conviction or could have been resolved on the basis of the record generated in the proceedings that led to the conviction, we must conclude that there was no need to hold an evidentiary hearing, and the singular assignment of error is accordingly without merit. See State v. Cole (1982), 2 Ohio St.3d 112, \_\_\_ N.E.2d \_\_\_; State v. Perry (1967), 10 Ohio St.2d 175, 226 N.E.2d 104; R.C. 2953.21.

It is undisputed that a "federal habeas petitioner who claims that he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is



entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings." Wainwright v. Sykes, 433 U.S. 72, 87 (1977). A petitioner may not, however, raise "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them there as required by state procedure." *Id.* at 87.

In United States v. Frady, 456 U.S. 152 (1982), this Court reiterated the holding that, absent a showing of cause and prejudice, the failure of a state prisoner to present his claims to a state appellate court constitutes a waiver of those claims. See also Wesselman v. Seabold, 834 F.2d 99 (6th Cir. 1987); Shepard v. Foltz, 771 F.2d 962 (6th Cir. 1985); Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984). Also in Frady, *supra*, Engle v. Isaac, 456 U.S. 107 (1989), and Henderson v. Kibbe, 431 U.S. 145 (1977) this Court enunciated the two policy considerations underlying the waiver doctrine. Specifically, this Court indicated that the state's interest in orderly trial procedure and the considerations of comity and federalism provide the foundation for the waiver rule. Petitioner Terrell did not raise his third, fourth, and sixth through tenth grounds for relief on direct appeal nor did he ever present his supplemental unsigned journal entry claim to a single Ohio court. Furthermore, the Ohio Court of Appeals and Ohio Supreme Court were not even given a procedurally appropriate chance to

consider Terrell's sixth through tenth grounds for relief because Terrell did not appeal the claims in his post-conviction petition to these courts.<sup>3</sup> Thus, it is clear that Terrell absolutely denied the Ohio appellate courts the opportunity to pass upon and correct alleged violations of constitutional rights. Such a deliberate bypass of the state court system clearly results in a waiver of the claims raised in the instant habeas corpus petition absent a showing of cause and prejudice.

To date Terrell has failed to demonstrate either cause for or prejudice resulting from his failure to fairly present his claims to the Ohio courts. For example, as cause for his waiver Terrell alleges that his brother who traveled extensively was unable to provide him with certain documents with which he had been entrusted and that prison officials destroyed or lost some necessary documents. However, as held by the district court, (A.-9) neither the letter entrusted to Terrell's brother nor Terrell's possession of the letter or the lack thereof explains or constitutes an impediment for Terrell's procedural default. (A.-15). In addition, Terrell's claim that prison officials destroyed or lost documents pertaining to his case cannot constitute cause for the procedural default when Terrell was represented by able counsel on appeal who plainly stated that as a result of his best legal

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<sup>3</sup> Assuming *arguendo* that this Court were to find that Terrell's conclusory ineffective assistance of counsel claims were not waived, Respondent submits that defense counsel's alleged refusal to file "any motion petitioner wanted filed" hardly constitutes an actionable habeas corpus violation when evaluated in accordance with the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984).

judgment, he would not appeal frivolous assignments of error to the Court of Appeals. Thus, Terrell has failed to demonstrate cause.

Moreover, the facts presented do not establish the existence of a constitutional violation which resulted in the conviction of an innocent defendant. See, Murray v. Carrier, 477 U.S. 478 (1985); Ewing v. McMackin, 799 F.2d 1143 (6th Cir. 1986). Indeed, to the contrary, the evidence submitted at trial included a video tape of one robbery, eyewitness identification, and the almost immediate apprehension of Terrell with the bank funds and weapon which he used in the robbery in his possession. Under these circumstances Terrell has failed to establish the slightest prejudice resulting from his waiver. The Sixth Circuit Court of Appeals' affirmance of the district court's finding that Terrell's supplemental, third, fourth, and sixth through tenth grounds for relief, have been waived is correct and does not present a question for review by this Court.

Finally, the decisions of the courts below are consistent with Harris v. Reed, 489 U.S. \_\_\_, 109 S. Ct. \_\_\_, 103 L. Ed. 308 (1989). In Harris v. Reed, this Court held that:

a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar. Caldwell, 472 U.S., at 327, quoting Long, 463 U.S., at 1041.

103 L. Ed.2d at 317.

In the case at bar the Ohio Court of Appeals clearly and unequivocally stated that its determination was premised on a state procedural bar. Specifically, the Ohio Court of Appeals held:

Because we are convinced that the various matters asserted in the petition either should have been raised by new counsel on direct appeal from the judgment of conviction or could have been resolved on the basis of the record generated in the proceedings

that led to the conviction, we must conclude that there was no need to hold an evidentiary hearing, and the singular assignment of error is accordingly without merit. See State v. Cole (1982), 2 Ohio St. 3d 112, \_\_\_ N.E.2d \_\_\_; State v. Parry (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104; R.C. 2953.21.

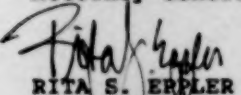
The last Ohio state court which rendered a decision on the case at bar clearly stated that its judgment rested on a state procedural bar. Therefore, the federal court's decision need not be reviewed by this Court.

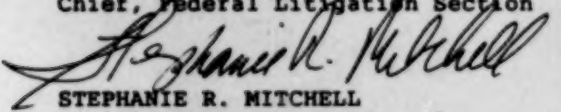
#### CONCLUSION

For the foregoing reasons, Respondent submits that Terrell has failed to raise an issue deserving of review by this court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RITA S. ERPLER  
(Counsel Of Record)  
Assistant Attorney General  
Chief, Federal Litigation Section

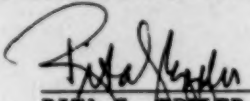
  
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ATTORNEYS FOR RESPONDENT



CERTIFICATE OF SERVICE

I, Rita S. Eppler, counsel of record for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11<sup>th</sup> day of September, 1989, I served a copy of Respondent's Brief In Opposition To Petition on each of the parties to this action by mailing such copy in duly addressed envelopes, with first-class postage prepaid, to Michael Terrell, Southern Ohio Correctional Facility.

  
\_\_\_\_\_  
RITA S. EPPER  
Assistant Attorney General

APPENDIX  
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No. 88-3543

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

MAY 19 1989

LEONARD GREEN, Clerk

MICHAEL TERRELL,  
Petitioner-Appellant,

v.

RONALD C. MARSHALL, SUPT.,  
Respondent-Appellee

ORDER RECEIVED  
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FEDERAL LITIGATION SECTION  
MAY 23 1989

BEFORE: BOGGS and NORRIS, Circuit Judges; and BALLANTINE\*,  
United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

*Leonard Green*  
Leonard Green, Clerk

\*Hon. Thomas Ballantine, Jr., sitting by designation from the  
Western District of Kentucky

No. 88-3543

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

APR 3 1989

LEONARD GREEN, Clerk  
RECEIVED  
OFFICE OF THE ATTORNEY  
GENERAL  
FEDERAL LITIGATION SECTION

ORDER

APR -4 1989

MICHAEL TERRELL,  
Petitioner-Appellant,

v.

RONALD C. MARSHALL, Supt.,  
Respondent-Appellee.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION  
Sup. Court Rule 24 limits citation to specific situations. Please see  
Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If  
cited, a copy must be served on other parties and the Court.  
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: BOGGS and NORRIS, Circuit Judges; and BALLANTINE,  
District Judge.\*

This pro se Ohio prisoner appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon consideration of the record and the briefs, the panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Michael Terrell challenged his jury conviction on two counts of aggravated robbery for which he was sentenced to serve two consecutive terms of seven to twenty-five years' imprisonment. His petition for a writ of habeas corpus included eleven grounds for relief: (1) the trial court misled him as to the maximum possible penalty; (2) the trial court erred in denying a motion for mistrial after a state witness identified Terrell as wearing a jail uniform; (3) and (4) Terrell was denied effective assistance of counsel; (5) the trial court erred by admitting a

\*The Honorable Thomas A. Ballantine, Jr., U.S. District Judge for the Western District of Kentucky, sitting by designation.



waiver of rights document into evidence; (6) conviction was based on improperly admitted pretrial statement; (7) he was denied counsel at identification line-up; (8) in-court identification was tainted by improper pretrial identification procedure; (9) prosecution used perjured testimony; (10) Terrell's indictment was not properly signed; and (11) the conviction was obtained following an unlawful search and seizure.

Terrell filed a motion to amend the petition and claimed his conviction was invalid because the judgment was not properly signed by the trial judge. In a series of additional pleadings, Terrell asserted that all his claims presented in the petition had been presented to state courts and therefore were exhausted.

The matter was referred to the magistrate who determined that Terrell had waived grounds numbered three, four, seven, eight, nine, and ten and made no showing of cause and prejudice for his failure to raise these claims in state court proceedings. The magistrate determined that Terrell's remaining claims lacked merit and recommended that the petition should be dismissed. Following de novo review in light of Terrell's objections, the district court adopted the magistrate's report and dismissed the petition.

On appeal, Terrell argues that the district court erred by dismissing the petition for a writ of habeas corpus.

Upon review we conclude that the district court properly determined that Terrell's third, fourth, seventh, eighth, ninth, and tenth claims, as well as his complaint that the judgment was not signed, were not reviewable. See United States v. Prady, 456 U.S. 152 (1982); Ewing v. McMackin, 799 F.2d 1143, 1148-49 (6th Cir. 1986).

We further conclude that the district court did not abuse its discretion by dismissing the remaining claims. First, Terrell's claim that the trial judge misled him does not state a constitutional violation. See United States v. Lippert, 740 F.2d 457 (6th Cir. 1984). Second, his objection to the reference to his jail uniform does not present a constitutional question under the circumstances of this case. See Brown v. Estelle, 536 F.2d 1037 (5th Cir. 1976). Next, in light of the totality of the circumstances, the allegation of police deceit does not render an otherwise valid confession involuntary and inadmissible. See Frazier v. Cupp, 394 U.S. 731, 739 (1969). Lastly, the allegation of an illegal search and seizure is not reviewable in this petition for habeas corpus. See Stone v. Powell, 428 U.S. 465 (1976).

Accordingly, the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

*James J. [Signature]*  
Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

FILED  
KENNETH J. MURPHY  
CLERK

JUN 3 9 36 AM '88

U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WEST DIV. CINCINNATI

MICHAEL TERRELL,

Petitioner

v.

C-1-84-1511

RONALD C. MARSHALL,

Respondent

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ORDER

This matter is before the Court upon the Report and Recommendation of the United States Magistrate (doc. no. 26), petitioner's Motions to Review, Objections and Supplements thereto (doc. nos. 30, 31, 32, 33 and 35) and petitioner's Motion for Leave to File Pleading of Relief and Supplement thereto (doc. nos. 34 and 35).

Petitioner's Motions for Leave to amend his petition are hereby GRANTED.

This case was referred to the United States Magistrate pursuant to 28 U.S.C. § 636 for consideration and report on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254.

The Magistrate found that petitioner has exhausted his state court remedies and his petition is now properly before this Court. The Magistrate recommended that petitioner's Writ of Habeas Corpus be denied.

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Upon consideration of the petitioner's objections, and upon conducting a de novo review of the entire record, the Court finds that petitioner's conviction is supported by sufficient evidence and that the petitioner's objections to the Report and Recommendation are without merit. Substantial justice has been done in this case. The alleged errors are harmless beyond a reasonable doubt. Accordingly, the Court hereby ADOPTS the Report and Recommendation and incorporates it into this Order by reference.

As noted in the Magistrate's Report, petitioner was convicted on overwhelming evidence that included a videotape of one robbery, eyewitness identification and the immediate apprehension of petitioner with bank funds and the weapon used in the robbery. Under such circumstances, the procedural errors alleged are harmless.

As noted in Strickland v. Washington, 466 U.S. 668 (1984), there are certain kinds of errors that can never be harmless. Any error which amounts to a denial of the right to court-mandated counsel is so basic that it is presumed prejudicial. The Court held, however, that errors by counsel generally do not warrant setting aside a judgment if the errors had no effect on the judgment and sentence. Despite petitioner's allegations, the record shows no actual or constructive denial of counsel.

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Petitioner correctly contends that the standard applied in State v. Cole, 2 Ohio St.3d 112 (1982), which was cited by the Magistrate, was established after the decision in question and that the standard of State v. Hester, 45 Ohio St.2d 156 (1976), governs this case. This contention is without consequence. While Hester prohibited the use of res judicata in dismissing a petition without adjudication of the competent counsel issue, it also maintained the ultimate "fair trial" and "substantial justice" standard in determining whether reversal or the granting of a new trial was warranted. "The test in determining if the accused had effective retained counsel is whether the accused, under all the circumstances . . . had a fair trial and substantial justice was done." Hester at 156.

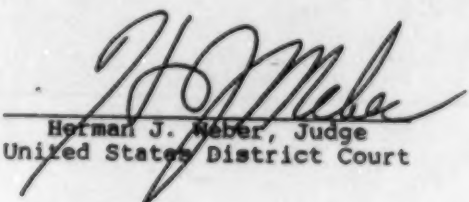
Petitioner's objection that the Magistrate's finding, that Ohio courts would have barred litigation of the petitioner's Miranda claim, was clearly erroneous, is also without merit. The Magistrate's finding was based on the Ohio Supreme Court decision in State v. Awan, 22 Ohio St.3d 120, (1986). In that case, the Court held that an appellant court will not consider any error that counsel could have raised but did not at the time the trial court could have corrected the situation itself. Awan at 122.

The remainder of petitioner's objections have either been adequately addressed by the Magistrate in his decision or present no specific contentions that would warrant different findings.

A thorough reading of the record and pleadings in this case show petitioner to be intelligent, informed and articulate in legal matters. Far from being an innocent victim of the "system", he played a decisive role in guiding the course of his criminal case including the setting of the trial date.

Accordingly, petitioner's Writ of Habeas Corpus is DENIED and this action is DISMISSED.

IT IS SO ORDERED.

  
Herman J. Weber, Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

MICHAEL TERRELL,  
Petitioner,  
vs.  
TERRY MORRIS,  
Respondent.

CIVIL NO. C-1-84-1511

REPORT AND RECOMMENDATION  
OF THE MAGISTRATE

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Presently pending before this Court is Michael Terrell's petition for writ of habeas corpus. The petitioner is currently in respondent's custody pursuant to a conviction for two violations of Ohio Rev. Code § 2911.01 (aggravated robbery) wherein he is serving consecutive sentences of seven to twenty-five years on each charge.

Petitioner appealed his conviction to the Ohio Court of Appeals which affirmed his conviction in State v. Terrell, Hamilton Cty. C.A., Nos. 81-810148 and 81-810164, (Dec. 30, 1981). Thereafter, petitioner appealed the decision to the Ohio Supreme Court which dismissed his appeal for want of prosecution (respondent's exhibit D). Later, petitioner filed a delayed appeal with the Ohio Supreme Court which dismissed his appeal sua sponte for failure to raise a substantial constitutional question.

Petitioner also sought post-conviction relief in the state courts alleging ineffective assistance of counsel. On July 7, 1982, the Hamilton County Court of Common Pleas issued findings of fact and conclusions of law denying the

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petition. Petitioner appropriately appealed this decision to both the Hamilton County Court of Appeals and the Ohio Supreme Court, both of which affirmed the trial court's denial of the petition: the Court of Appeals by decision dated June 1, 1983 and the Supreme Court by overruling the motion for review.

Accordingly, the petitioner has exhausted his state court remedies and his petition is now properly before this Court.

I.

At the outset, this Court must discern which issues the petitioner may properly raise in this action. As respondent points out, review of the petition indicates that petitioner attempts to raise as grounds to be decided by this Court, several issues which he has failed to raise in the state courts during the pendency of his direct appeal or his post-conviction relief action. Because petitioner has exhausted his state court remedies and consequently has no state forum in which to litigate these new claims, this Court must decide which issues petitioner has waived as a result of his failure to present them to state courts. Weeks v. Bergen, 749 F.2d 322 (6th Cir. 1984).

The general rule is that issues not raised by a state prisoner at trial, on appeal or in a post-conviction proceeding may not be considered by a federal habeas corpus court absent a showing of cause for failing to raise the claim in state courts and resulting prejudice. Engle v.



Isaacs, 456 U.S. 107, reh. denied, 456 U.S. 1001 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Payne v. Rees, 738 F.2d 118 (6th Cir. 1984); see United States v. Prady, 456 U.S. 152 (1982).

Respondent argues that petitioner has waived his third, fourth and sixth through tenth grounds. This Court agrees that petitioner has waived grounds seven, eight, nine, and ten by his failure to raise them in any action in the state courts. Determination of the waiver of the remaining claims of ineffective assistance of counsel and the voluntariness of his pretrial statements is not so clear.

In regard to his claim of ineffective assistance of counsel, petitioner first litigated this claim in a post-conviction relief action. In making findings of fact and conclusions of law regarding this claim, the trial court found: (1) that petitioner had received effective assistance of counsel; and (2) that petitioner had waived this claim by failing to raise it in his direct appeal and subsequently, was procedurally barred from raising this issue. When appealing this decision, petitioner raised the sole issue of whether the trial court should have conducted an evidentiary hearing prior to its determination. The Court of Appeals in Ohio v. Terrell, Ap. No. C-820629, Hamilton Cty. Ap. (June 1, 1983) ruled that because petitioner was procedurally barred from raising the issue of effectiveness of his trial counsel as a result of his failure to raise the issue on appeal, the lower court's denial of petitioner's request for an

evidentiary hearing was correct. Thus, the Court of Appeals affirmed the lower court's ruling on the basis of the procedural bar. Consequently, as a result of his procedural default, the petitioner has waived this claim absent a showing of cause and prejudice.

In regard to the voluntariness of his pretrial statements, petitioner argues in ground five that the trial court failed to properly entertain his motion to suppress these statements by its failure to conduct a hearing on the issue of voluntariness. Petitioner, in essence, argues that the trial court violated the mandate of Jackson v. Denno, 378 U.S. 368 (1964). Petitioner raises this argument or a semblance thereof for the first time in his delayed appeal to the Ohio Supreme Court. The failure to raise the issue of a pretrial voluntariness determination in his direct appeal to the Hamilton County Court of Appeals procedurally precludes the Ohio Supreme Court's consideration thereof. See State v. Awan, 22 Ohio St. 3d 120 (1986). When ruling on his delayed appeal, however, the Ohio Supreme Court failed to explicitly state that it relied upon this procedural default when it found no substantial constitutional question presented in petitioner's appeal.

When it is unclear from the face of a state court opinion whether the state relied upon a procedural bar as a basis for rejecting a claim, the appropriate procedure is for the district court to examine the arguments presented to the state court. Shepard v. Poltz, 771 F.2d 962, 965 (6th Cir. 1985); Raper v. Mintzes, 706 F.2d 161 (6th Cir. 1983).

This Court's independent review of the memoranda presented to the Ohio Supreme Court indicates that the respondent failed to address this issue in his arguments. Since petitioner filed his delayed appeal without the benefit of counsel and failed to frame the issue in the appropriate legal context, respondent's failure to address the issue and argue the procedural bar is not determinative. Rather, in light of the Ohio court's long precedent in applying the analogous contemporary objection rule, this Court finds that petitioner's procedural default was such that the Ohio courts would have barred the litigation of the claim.<sup>1</sup> Thus, petitioner has waived this aspect of his voluntariness claim in regard to the admission of his pretrial statements absent a showing of cause and prejudice.

Accordingly, this Court finds the petitioner has waived the following grounds:

- (1) Grounds three and four which raise the issue of effective assistance of counsel;
- (2) Ground five which challenges the trial court's failure to make a pretrial voluntariness ruling;
- (3) Ground seven which alleges a denial of counsel at a pretrial lineup;
- (4) Ground eight which challenges the in-court identification of petitioner as the perpetrator;
- (5) Ground nine which alleges that the prosecution used perjured testimony; and

<sup>1</sup> See State v. Awan, 22 Ohio St. 3d 120 (1986); State v. Johnson, No. CA-6787, Stark Cty. C. App. (May 5, 1986); State v. Lane, 49 Ohio St. 2d 77 (1976).

- (6) Ground ten which alleges that the indictment was not signed.

Accordingly, before these claims may be reviewed in this federal habeas corpus action, the petitioner must make a showing of cause for his failure to raise these claims and resulting prejudice. Engle v. Isaacs, 456 U.S. 107, reh. denied, 456 U.S. 1001 (1982). In determining what constitutes cause, the Supreme Court most recently held ". . . that the existence of cause for a procedural default must ordinarily turn upon whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule." Murray v. Carrier, 54 U.S.L.W. 4820, 4822 (June 26, 1986).

Petitioner asserts as cause for his failure to raise these issues, the fact that his brother who traveled extensively was unable to provide him with certain documents with which he had been entrusted.<sup>2</sup> Petitioner also alleges that prison officials destroyed or lost some necessary documents. The precise issue this Court must determine is whether the reason which petitioner alleges, is sufficient cause for his procedural default which occurred when the initial direct appeal was filed.

As the letter entrusted to petitioner's brother reveals, petitioner's appellate counsel, Robert Hastings, stated to petitioner in a letter dated November 3, 1981:

<sup>2</sup> This letter is included by petitioner as an exhibit to document 19.



The assignments of error I presented to the Court of Appeals have the best chance of succeeding. In my opinion, the identification evidence and fingerprint evidence do not raise issues that would cause the Court of Appeals to grant you a new trial. It has always been my policy to present the best issues possible rather than raise all the issues possible. Too often if the Court is confronted with a number of frivolous errors they consider all errors to be frivolous.

Letter, November 3, 1981.

As is evident from the letter, petitioner's possession of the letter or lack thereof does not explain or constitute an impediment for his procedural default. Likewise, petitioner's claim that prison officials destroyed or lost documents pertaining to his case, cannot constitute cause for the procedural default when petitioner was represented by able counsel on appeal who plainly states that as a result of his best legal judgment, he would not appeal frivolous assignments of error to the Court of Appeals. Thus, petitioner has failed to demonstrate cause.

Furthermore, this Court's analysis of the issues which petitioner has defaulted, reveals their frivolous nature. Accordingly, petitioner has failed to establish actual prejudice which so infects the entire trial process that petitioner might not otherwise have been convicted. United States v. Prady, 456 U.S. at 170 (1982). Specifically, in regard to the trial court's determination of the voluntariness of his pretrial statements, this Court notes that in light of the overwhelming independent evidence presented by the prosecution at trial including a videotape

of one robbery, eyewitness identification, and the almost immediate apprehension of petitioner with the bank funds and weapon used in the robbery, petitioner has failed to establish prejudice.

In sum, this Court concludes that petitioner has waived grounds three, four, five, seven, eight, nine and ten and is therefore barred from litigating those grounds in this action.

## II.

As his first ground for relief, petitioner alleges that the trial court mislead him and rendered a harsher sentence after he elected to stand trial. Petitioner's alleged constitutional violation stems from a colloquy between the prosecutor, petitioner, his attorney and the trial court in regard to plea bargain negotiations (tr. 29-31) wherein he asserts the trial court failed to inform him that he could receive the maximum sentence on each charge of aggravated robbery with which he was charged. As a result of a proposed plea bargain, the prosecutor had offered to seek concurrent sentences if petitioner pled guilty. The trial court in explaining to petitioner what concurrent sentences meant, specifically stated that "concurrent means running together" (tr. 29). However, at no time did the trial court indicate that it would abide by the plea bargain offer if petitioner exercised his right to stand trial.

Although a considerable difference of opinion exists as to how the plea negotiation process should be structured in

terms of judicial involvement, judicial participation per se does not offend any constitutional right. The Sixth Circuit in United States v. Lippert, 740 F.2d 457 (6th Cir. 1984) indicated that unless a showing of vindictiveness in return for exercising the constitutional right to stand trial existed, due process is not violated. More closely on point, however, is Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1983), cert. denied, 454 U.S. 840, wherein the Fifth Circuit held in a comprehensive review of plea bargaining that North Carolina v. Pearce, 395 U.S. 711 (1969) was completely inapplicable to post-plea bargain sentencing proceedings. Thus, the Blackburn court upheld a lower court's sentence which was harsher than that proffered in plea negotiations in which the court had participated.

In the instant case, petitioner has failed to establish that his sentence was a result of judicial vindictiveness or even disproportionate to the crimes he committed as respondent argues. Consequently, this ground is without merit.

### III.

As his second ground, petitioner alleges that the trial court committed constitutional error when it overruled his motion for a mistrial after a prosecution witness identified petitioner as wearing a jail uniform. The remark occurred when Augustus Feldman, a police officer, identified petitioner in this manner: "The defendant, and the person I talked to, is the young man seated, sitting next to the counselor . . . , and he's dressed in a blue Hamilton County

jail uniform" (tr. 255-256). The issue before the Court is whether the trial of petitioner in prison clothing constituted a violation of his right to a fundamentally fair trial and due process. In determining this issue, the Ohio Court of Appeals held that petitioner's failure to object to his clothing at the outset of the trial when the trial court could have acted upon his request constituted a waiver of this objection.

When presented with this precise issue in a federal habeas action, the Fifth Circuit held that while trial in identifiable prison apparel does not constitute a per se violation of due process, a defendant who was compelled to stand trial so attired would be entitled to relief; but when no objection was made, such failure is sufficient to negate the presence of compulsion necessary to establish a constitutional violation. Brown v. Estelle, 536 F.2d 1037 (5th Cir. 1976).

This Court's review indicates that petitioner's failure to object to trial in prison attire at the outset of trial negates any indicia of compulsion and thus constitutes a waiver situation analogous to the contemporary objection rule. State v. Foster, No. C-800341 (1st Dist. May 13, 1981). Because petitioner has failed to establish either cause or prejudice, Wainwright v. Sykes, 433 U.S. 72 (1977), he is barred from litigating this claim upon habeas corpus review.



With regard to the testimony, the Court of Appeals held that in light of his criminal record of which the jury was properly apprised, the identification of petitioner in prison garb was not prejudicial. State court rulings on the admission or exclusion of evidence will not support a claim for federal habeas corpus unless the petitioner has been denied his due process rights to a fundamentally fair trial. Webster v. Rees, 729 F.2d 1078 (6th Cir. 1984). This Court's review indicates petitioner suffered no prejudice in the identification of him in prison attire. Consequently, this ground is without merit.

IV.

In ground six, the petitioner challenges the admissibility of his confession, alleging that he failed to execute a valid waiver of his Miranda rights before making the statements. Among the various pleadings filed by petitioner in this action are allegations of beatings, deceit, and invocation of his right to counsel during questioning.

Prior to trial, counsel for petitioner moved the court to suppress these statements (tr. 32-33). The trial court held that the voluntariness and validity of the Miranda waiver would be determined during trial when these statements were offered into evidence. Through the testimony of police officers, it was established that the petitioner had been given the appropriate Miranda warnings and executed a valid waiver thereof before questioning commenced. Testimony also

existed that he was not intoxicated; that he was not coerced, abused or threatened; and that he did not request counsel. On the basis of this testimony, the trial court admitted petitioner's oral statements which were reduced to writing and signed by him into evidence, and thus, implicitly found the statements to be voluntary. See Paxton v. Jarvis, 735 F.2d 1306, cert. denied, 469 U.S. 935 (1985).

This Court finds no constitutional error in the trial court's substantive finding of voluntariness in light of the testimony presented at trial. As the Ohio Court of Appeals points out, petitioner's testimony concerning how the confessions came about and the reason therefor became an issue of credibility appropriately for the trier of fact. Crane v. Kentucky, 54 U.S.L.W. 4598 (1986), 476 U.S. \_\_\_\_.

Accordingly, this ground is without merit.

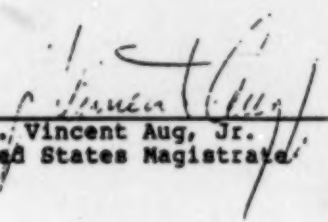
V.

As his last ground for relief, petitioner challenges the trial court's admission into evidence of certain items in violation of his Fourth Amendment rights. Federal review of a Fourth Amendment claim is barred if the state provided a full and fair opportunity to litigate the claim. Stone v. Powell, 428 U.S. 465 (1976). For such an opportunity to have existed, the state must have provided in the abstract, a mechanism by which to raise the claim and the claim must not have been frustrated by a failure thereof. Riley v. Gray, 674 F.2d 522, 526 (6th Cir.) cert. denied, 459 U.S. 948 (1982). Because the petitioner has failed to allege that his

presentation of his Fourth Amendment claims in the state courts was frustrated, Stone v. Powell, precludes the consideration of this ground. Accordingly, this ground is without merit.

VI.

For the above and foregoing reasons, it is hereby RECOMMENDED that petitioner's writ of habeas corpus be DENIED.

  
\_\_\_\_\_  
J. Vincent Aug, Jr.  
United States Magistrate